

EXHIBIT 1

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 08-99000-smb

4 Adv. Case No. 09-01182-smb

5 - - - - - x

6 In the Matter of:

7 BERNARD L. MADOFF INVESTMENT SECURITIES LLC,

8 Debtor.

9 - - - - - x

10 IRVING H. PICARD, TRUSTEE FOR THE LIQUIDATION OF

11 BERNARD L. MADOFF INVESTMENT SECURITIES LLC,

12 Plaintiff,

13 v.

14 MERKIN ET AL.,

15 Defendants.

16 - - - - - x

17 U.S. Bankruptcy Court

18 One Bowling Green

19 New York, NY 10004

20 June 1, 2016

21 10:01 AM

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23 B E F O R E :

24 HON STUART M. BERNSTEIN

25 U.S. BANKRUPTCY JUDGE

1 **Hearing re: Motion for Summary Judgment**

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25 **Transcribed by: Sonya Ledanski Hyde**

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1 sequence of what happens.

2 MR. LEVANDER: Okay. We respectfully disagree
3 about that, but I understand Your Honor's position.

4 THE COURT: There's a reason it hasn't been cited
5 in the Southern District since 1973 (indiscernible).

6 MR. LEVANDER: Okay. So let me talk about
7 subordination (indiscernible).

8 THE COURT: Okay. Well, it rises and falls with
9 the willful blindness issue, I guess.

10 MR. LEVANDER: Well, let me make two other points.
11 First, I just want to reserve the legal issue that we think,
12 under Delaware law, under the partnership claim, they
13 haven't satisfied the partnership exception --

14 THE COURT: But part of that assumes that they can
15 get paid by the primary obligor.

16 MR. LEVANDER: But it also turns on when you get a
17 judgment against the general partner of a partnership, under
18 Delaware law. It's in our brief.

19 THE COURT: Okay.

20 MR. LEVANDER: Subordination, in our view, is at
21 least as tough as the willful blindness, and we think it has
22 to, as I think you've used the phrase, shocks the
23 conscience. Nothing about what's in this discussion, even
24 if you accept all the differences --

25 THE COURT: Well, but (indiscernible) held that

1 willful blindness was sufficient to sustain a claim of
2 equitable subordination also in Katz, I think.

3 MR. LEVANDER: In the Katz case, on a motion to
4 dismiss, without examining the facts. We now have the
5 facts, and he didn't say automatically, willful blindness
6 equals subordination. But also, there's a sort of -- at
7 this point, they shouldn't be able to have it both ways. If
8 they're going to seek subordination, that means they're not
9 going to get the \$280 million, and so therefore there's no
10 claim against the --

11 THE COURT: They really don't need subordination,
12 because they're going to get disallowance if they win, and
13 Ascot doesn't pay them. And if Ascot pays them, they've got
14 their remedies. So equitable subordination's just a red
15 herring in the case. Doesn't mean it's insufficient, but
16 it's just a red herring.

17 MR. LEVANDER: Yeah, but I think it should be
18 dismissed, Your Honor. Thank you very much.

19 THE COURT: Okay, thank you. Who's next?

20 MS. ARCHER: I am, Your Honor.

21 THE COURT: Please, don't repeat what's been
22 argued.

23 MS. ARCHER: I will do my best.

24 THE COURT: Okay, I don't know what's left. Go
25 ahead.

1 MS. ARCHER: Just a few things from Ascot's
2 perspective. And Your Honor, Judith Archer, counsel for
3 receiver of Ascot Partners, and also for Ascot Fund. Now,
4 as Your Honor pointed out, Mr. Levander has already
5 addressed the willful blindness issue in Count 2, so I won't
6 go into that again. So I will move into Count 9, which is
7 the subsequent transfer claim against Ascot Partners and
8 Ascot Fund. Under that Count, the trustee seeks to recover,
9 according to (indiscernible) their amended complaint,
10 subsequent transfers of \$225 million from Ascot partners,
11 and according to his expert report, between \$21 million and
12 \$33 million from Ascot Fund. So our position is, as Your
13 Honor noted earlier, we believe that the trustee cannot
14 establish willful blindness, that summary judgment is
15 appropriate, and therefore the subsequent transfer claims
16 would fall with that determination. If they don't, however,
17 they still should be dismissed as against Ascot Partners and
18 Ascot Fund. Now, the trustee can cede --

19 THE COURT: I understand the argument with Ascot
20 Partners, (indiscernible), but why should it be dismissed
21 with Ascot Fund?

22 MS. ARCHER: Well, as Your Honor noted in the
23 decision on the motion to dismiss, any knowledge of Mr.
24 Merkin should not be imputed to Ascot Fund, which became a
25 limited partner in Ascot Partners in 2003, many years before

1 the beginning of the two-year applicable transfer period.

2 THE COURT: But why did, during the period that
3 Merkin was involved -- wasn't a partner, but was in control
4 of Ascot Fund, Ascot Fund acquired knowledge, which led it
5 to suspect a high probability of fraud. Should I disregard
6 that?

7 MS. ARCHER: Yes.

8 THE COURT: Simply because after 2003, Merkin
9 wasn't there anymore?

10 MS. ARCHER: Ascot Fund's legal status changed as
11 of 2003. It became an investor --

12 THE COURT: I understand. But people have
13 knowledge, it has institutional knowledge, arguably.

14 MS. ARCHER: We certainly have belief they had any
15 institutional knowledge --

16 THE COURT: I understand that.

17 MS. ARCHER: But before that point, there was a
18 point in time where there was a board of directors, there
19 were other advisors. The only thing that existed before
20 2003 was an agreement between Ascot Fund and GCC, that it
21 would be an investment advisor. Merkin was not a general
22 partner even of Ascot Fund at that point. So we don't
23 believe even before that time any of Merkin's knowledge can
24 be inputted, but we certainly don't think that that
25 knowledge, to the extent that there is any -- because the

1 trustee had laid out no evidence with respect to the timing
2 of that -- and when Ascot Fund gained any specific knowledge
3 through imputation or otherwise. So the trustee had that
4 burden on this motion, and has failed to do that. So we
5 don't believe that any purported knowledge, well before
6 Ascot Fund became a limited partner, should be implicated in
7 any case after 2003, and certainly after 2006, which is the
8 applicable period for the transfers. And those are the only
9 transfers that Ascot Fund, the trustee has a claim against
10 Ascot Fund for.

11 The trustee has, I will say, mischaracterized the
12 evidence with respect to Ascot Fund and its relationship
13 with Merkin. The trustee contends that Mr. Merkin, after
14 2003, continued to direct the fund, and that's simply not
15 the case. The only evidence that the trustee submits -- and
16 it is the trustee's burden on this point -- is that Mr.
17 Merkin, in his role as general partner of Ascot Partners,
18 made investment decisions for Ascot Partners, which
19 necessarily meant he made investment decisions for all of
20 the limited partners, including Ascot Funds. There were
21 some ministerial things that people at GCC took care of.
22 There's no evidence that Mr. Merkin had any separate
23 relationship other than his GP position at Ascot Partners
24 for Ascot Fund, and there's no evidence that there was
25 anything other than ministerial functions that GCC performed

1 for Ascot Fund, and other limited partners.

2 The evidence in the record shows that the
3 directors of Ascot Fund decided, made the determination to
4 invest in Ascot Partners, in the master feeder structure,
5 and at that point, there was a different relationship with
6 Mr. Merkin and with GCC. That is not sufficient to impute
7 the knowledge of Mr. Merkin, whenever he acquired it, to
8 Ascot Fund, for transfers that occurred between 2006 and
9 2008. There's authority in our papers that limited partners
10 have an investor-like role, and that supports what we've
11 said, and this Court recognized in the motion to dismiss
12 that the appropriate timeframe is after the 2006 transfers,
13 and not going all the way back to before, when Ascot Fund
14 had a direct account with BLMIS. I won't go back to the
15 Ascot Partners thing, I believe Your Honor understands that,
16 and the trustee has conceded that Ascot Partners is not a
17 subsequent transferee. It doesn't even address our argument
18 with respect to that.

19 And there also is authority that imputation is an
20 issue that can be decided on summary judgment. The trustee,
21 as he has done for every one of his arguments in his
22 opposition, has said summary judgment is appropriate here,
23 but this really an issue of whether there are disputed
24 facts, and the evidence that the trustee has put forth.
25 There is none with respect to Ascot partners as a subsequent

1 transferee, and it is severely deficient with respect to
2 Ascot Fund in its capacity as a limited partner. And so we
3 believe that summary judgment is appropriate.

4 We agree with Your Honor that the equitable
5 subordination claim is a red herring, and that it would fall
6 based on the willful blindness, although we agree with Mr.
7 Levander that there is not necessarily an actual equality
8 between willful blindness and the kind of inequity that
9 would have to exist here for Ascot Partners, which is a non-
10 insider, and Your Honor has recognized that in that case,
11 the circumstances for equitable subordination are few and
12 far between. The trustee admits that he can't recover, in
13 both respects. But there's one issue that the trustee
14 implies, or vaguely refers to in his papers that I'd like to
15 address. So the trustee has to establish inequity, that the
16 misconduct resulted in injury to the creditors, and that
17 equitable subordination would not be inconsistent with the
18 Bankruptcy Act. That last prong fails when the trustee
19 seems to claim that he may or may not, on his whim, argue
20 that Ascot's net equity claim should be equitably
21 subordinated.

22 So we believe that if the trustee were to recover
23 on the \$280 million transfer claim, as Your Honor pointed
24 out in the motion to dismiss decision, that once those
25 monies are paid, or to the extent, since this is the

1 trustee's MO in this, the trustee permits a setoff, that
2 would give rise to a springing claim under 502(h) and that
3 that cannot be equitably subordinated, because that would be
4 a double recovery, which is barred by the Bankruptcy Act.
5 To the extent that the trustee attempts to equitably
6 subordinate the net equity claim, which there's some
7 indication in his briefing that he might try to do, although
8 there's nothing specific -- and this is a time where he
9 should have been specific on this. We made the showing on
10 our moving papers there's nothing in his opposition where he
11 tries to say how much of a net equity claim, whether it's
12 all of it or part of it, and how much does he intend to
13 offset? He throws out a \$550 million transfer number for
14 Ascot Partners --

15 THE COURT: But you don't have a net equity claim
16 if you lose and don't return the transfer.

17 MS. ARCHER: Well, but if we return the transfer,
18 then we do have a net equity claim in excess of \$226
19 million.

20 THE COURT: But then the trustee has gotten his
21 remedy.

22 MS. ARCHER: I agree with you. But there is some
23 implication -- and I'm happy to stop, Your Honor, if you
24 tell me that's the end of it -- but the trustee seems to
25 imply that he can subordinate, even if he recovers our net

1 equity claim. And that would be a double recovery, because
2 that net equity calculation is a comprehensive calculation
3 of the ins and outs in the accounts of monies invested, the
4 receptions over a 15-plus-year period. And that includes
5 the two years of the transfer. So if the trustee were to
6 try to subordinate the net equity claim, then that would be
7 a violation of the Bankruptcy Code, and he would not be able
8 to make out an equitable subordination claim. No claim,
9 with respect to subordinating a net equity claim, should be
10 permitted, and summary judgment should be clear and granted
11 on that. He should not be allowed to come back at trial and
12 somehow say that even if you recovered on an avoidable
13 transfer, and even if we paid it all, that somehow he should
14 get to subordinate the rest of our net equity claim.

15 THE COURT: I thought that the trustee was arguing
16 that if you have a 502(h) claim, it's a General 1 secured
17 claim, but not a claim against the customer estate.

18 MS. ARCHER: Your Honor, the trustee attempted to
19 argue that as well, but he completely ignored the fact that
20 this is a SIPA proceeding, that there is a customer estate,
21 and that Ascot Partners is a customer, is one of the largest
22 net losers. So there is no basis for the trustee somehow to
23 say that we should be thrown in with all of the general
24 unsecured creditors. That's not what SIPA says, it's not
25 what the Bankruptcy Act says, and it's not what any of the

1 cases say.

2 THE COURT: Okay.

3 MS. ARCHER: If there's nothing else, Your Honor?

4 THE COURT: No.

5 MS. ARCHER: Thank you.

6 THE COURT: Why don't we take a five-minute
7 recess, and then I'll hear from the trustee?

8 (Recess)

9 CLERK: Please be seated. Let's continue.

10 THE COURT: All right.

11 MS. HOANG: Good morning, Your Honor. Again, Lan
12 Hoang, on behalf of the trustee, Irving Picard. This
13 morning, you've heard the defendant argue at length that
14 it's the trustee's burden of proof on this motion for
15 summary judgment. It's not. It's the defendant's burden of
16 proof to come forth before this Court and to say that there
17 is no disputed issue of material fact, and that they're
18 entitled to summary judgment on their affirmative defense.
19 548(c) is an affirmative defense.

20 THE COURT: Well, you have a burden -- they can
21 also show that you can't sustain the burden of proof. In
22 other words, there's no evidence for you to prove that he
23 was willfully blind.

24 MS. HOANG: The Trustee need only rebut the proofs
25 that the Defendants put forth on the affirmative defense of

1 aren't recoverable?

2 MS. HOANG: No, Your Honor.

3 THE COURT: Okay.

4 MS. HOANG: We've -- we concede that point. They
5 are an initial transferee. To the extent we get a judgment
6 against them as an initial transferee, there's -- it seems
7 circular to try to get them as a subsequent transferee as
8 well.

9 THE COURT: All right.

10 MS. HOANG: On the subsequent transfer issues, I
11 think the argument on lack of good faith, on willful
12 blindness, there's factual issues related to 548 on the
13 initial transfer to Ascot Partners for the very same reason
14 the subsequent transfer claims against Mr. Merkin, GCC, and
15 Ascot Funds should also be denied summary judgment.

16 For equitable subordination, as well --

17 THE COURT: Well, it's never going to come to
18 that, though.

19 MS. HOANG: We don't know. It's an alternative
20 remedy. It's not to be --

21 THE COURT: Are there any circumstances under
22 which you could get equitable subordination if you went on
23 the willful blindness claim and (indiscernible) \$280
24 million?

25 MS. HOANG: No, Your Honor.

1 THE COURT: Are there any circumstances under
2 which --

3 MS. HOANG: For the 280 million, we're talking
4 about right now?

5 THE COURT: Well, if they repay, they're the only
6 transfer wherein they have a claim, right?

7 MS. HOANG: Yes, we're talking -- yes. Yes.

8 THE COURT: Okay. And there's no circumstances
9 under which you'd have to consider equitable subordination
10 if one of them didn't repay, because then you'd get full
11 disallowance under 502(d).

12 MS. HOANG: Yes.

13 THE COURT: So, under what circumstances would you
14 get equitable subordination in this case?

15 MS. HOANG: If --

16 THE COURT: Even if they weren't willfully blind?

17 MS. HOANG: Well, 502(d) is just -- I'm trying to
18 think of a nice -- it's just temporary, until they pay,
19 502(d).

20 THE COURT: Right.

21 MS. HOANG: It's -- and if they never pay, then
22 the Trustee would move to equitably subordinate. It's a --

23 THE COURT: But if they never pay, their claim is
24 disallowed.

25 MS. HOANG: Correct.

1 THE COURT: Why would you equitably subordinate a
2 disallowed claim?

3 MS. HOANG: If we equitably subordinate, then the
4 money goes into the final customer property, because, if we
5 just say, "You know what? You don't get the benefit of
6 that, that's" --

7 THE COURT: All I'm saying is, if they don't pay,
8 if you win and they don't pay, then there's no equitable
9 subordination. Their claim is disallowed. That's fair.

10 MS. HOANG: We would be okay with that, too, if
11 the --

12 THE COURT: So, I'm asking: are there any
13 circumstances under which there would ever be equitable
14 subordination of their claim?

15 MS. HOANG: We don't know that right now.

16 THE COURT: I'm asking you. You brought the
17 claim.

18 MS. HOANG: I don't know that. I'm hoping they do
19 pay. I mean, if they can't --

20 THE COURT: But if they pay, how could you
21 equitably subordinate their claim?

22 MS. HOANG: We wouldn't. That's -- it's an
23 alternative remedy.

24 THE COURT: Right.

25 MS. HOANG: If they pay, they're entitled to their

1 claim.

2 THE COURT: And if they don't, their claim is
3 disallowed, right?

4 MS. HOANG: Yes.

5 THE COURT: Okay.

6 MS. HOANG: I think Your Honor's gone through
7 their arguments with them on whether they're entitled to
8 this set-off, or this spring claim. That's not an issue
9 we're here on.

10 General partner liability: I don't think that
11 issue is ripe here as well, because you need a judgment.
12 And one of the paragraphs that are pointed out by -- in Mr.
13 Merkin's brief is that, while the general partner liability
14 is -- kicks in after you have a judgment and after you move
15 that the partnership can't pay, we're not there yet. And
16 this is an issue that we would consider at trial to be
17 deferred until after trial.

18 THE COURT: Okay.

19 MS. HOANG: If Your Honor has no --

20 THE COURT: Thank you very much.

21 MS. HOANG: Thank you.

22 MR. LEVENDER: Short rebuttal?

23 MS. HOANG: Short.

24 MR. LEVENDER: Thank you, Your Honor. Brief.

25 Brief. I promise to be brief.